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No. 92-1928

In the Supreme Court of the United States

OCTOBER TERM, 1993

DARRYL RAY EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge properly instructed the jury concerning the definition of the term "trigger," as used in 26 U.S.C. 5845(b).

2. Whether, in a prosecution for possession of an unregistered machinegun in violation of 26 U.S.C. 5861(d), the district court's omission of a detailed instruction concerning the element of knowledge was plain error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-19) is reported at 978 F.2d 1112.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1992. On January 5, 1993, the court of appeals denied a petition for rehearing. Pet. App. 20. The petition for a writ of certiorari was filed on April 5, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of possession of an unregistered machinegun, in violation of 26 U.S.C. 5861(d).[1] He was sentenced to 21 months' imprisonment, to be followed by two years' supervised release. The court of appeals affirmed. Pet. App. 19.

1. The National Firearms Act (NFA), 26 U.S.C. 5801-5872, prohibits any person from receiving or possessing a firearm that is not registered to him in the National Firearms Registration and Transfer Record. 26 U.S.C. 5861(d). Section 5845(a)(6) of the Act defines the term "firearm" to include "a machinegun." Under 26 U.S.C. 5845(b),

> [t]he term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include * * * any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

2. The evidence at trial showed that on April 17, 1990, agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) executed a search warrant at petitioner's residence and seized numerous weapons, including an M-11 nine millimeter semi-automatic pistol, which they found in a safe in petitioner's bedroom closet. Gov't Excerpt of Record 2, 4. The investigators also found a conversion

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[1] Petitioner was acquitted on three other counts of possession of unregistered firearms, in violation of 26 U.S.C. 5861(d), and on one count of possession of a firearm not identified by a serial number, in violation of 26 U.S.C. 5861(i).

bolt assembly in petitioner's bedroom, which bore a $125 price tag and a label reading "M-11 SMG," an abbreviation for an M-11 submachinegun. Gov't Excerpt of Record 5, 12. The M-11 was not registered in the National Firearms Transfer Record. See Pet. App. 21.

The purpose of the M-11 SMG bolt assembly was to convert an M-11 semi-automatic pistol, such as the one seized in petitioner's bedroom safe, into a fully automatic machinegun. An ATF agent testified at trial that, by substituting the M-11 SMG bolt assembly found on petitioner's desk for the bolt assembly of an M-11 semi-automatic pistol, a person could easily transform the weapon into a fully automatic firearm. When converted in that manner, an operator could fire more than one round at a time by pulling the bolt carrier and releasing it rather than by squeezing the trigger. Pet. Excerpt of Record 10-13.

In its charge to the jury concerning the elements of a violation of Section 5861(d), the district court explained the element of knowledge as follows:

> Although the defendant's possession of a firearm must have been knowing, the government need not prove that the defendant knew his possession was against the law. Even if you conclude that the defendant believed that his possession of a firearm was legal, or that he had some other motive, you must find him guilty of the offense charged if you conclude beyond a reasonable doubt that he knowingly possessed an unregistered firearm as charged[.]

Pet. C.A. Br. 25-26. Petitioner did not object to that instruction. Pet. C.A. Br. 26.

During the jury's deliberations, the foreman requested that the trial judge define the term "trigger," as used in the definition of "machinegun" in 26 U.S.C. 5845(b). Pet. Excerpt of Record 43. Petitioner's counsel

argued that the term "trigger" meant "the part of the action of a firearm moved by the finger to release the hammer or firing pin in firing." Pet. Excerpt of Record 28. Over petitioner's objection, the district court instructed the jury that "a trigger is defined as anything that releases the bolt to cause it to fire." Pet. Excerpt of Record 45.

3. On appeal, petitioner renewed his objection that the district court had instructed the jury incorrectly on the definition of the term "trigger." The court of appeals rejected that claim, reasoning that the district court's definition "comports with the structure and language of the NFA by focusing on the action that enables a firearm to shoot automatically without manual reloading." Pet. App. 16.

Petitioner also argued that the trial judge erred in failing to instruct the jury that, in order to convict him of possession of an unregistered machinegun, it was required to find that he knew he possessed a dangerous device of a type that would alert him to the likelihood of regulation. Pet. C.A. Br. 26. Because petitioner had neither requested an instruction concerning the element of knowledge at trial nor objected to the instruction given by the trial court, the court of appeals considered only whether the alleged instructional defect constituted plain error. Because the instruction given fully comported with the law of the circuit and petitioner was on notice concerning the M-11's automatic firing capabilities in any event, the court of appeals found no plain error. Pet. App. 17-18.

ARGUMENT

1. Petitioner contends (Pet. 8, 9-10) that the trial court's instruction concerning the term "trigger" was ambiguous and overbroad.

Although 26 U.S.C. 5845(b) defines a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot * * * by a single function of the trigger," the statute does not further define the term "trigger." In the absence of such a definition, "[i]t is a fundamental canon of statutory construction that words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989). In the context of Section 5845(b), the term "trigger" was obviously intended not to be limited to a particular type of firing mechanism, such as a curved metal bar that initiates the firing sequence when squeezed with the finger, but to include any mechanism that activates a firearm to shoot more than one shot by a single function. As the court explained in *United States* v. *Jokel*, 969 F.2d 132, 135 (5th Cir. 1992):

> To construe "trigger" to mean only a small lever moved by a finger would be to impute to Congress the intent to restrict the term to only one kind of trigger, albeit a very common kind. The language [of the statute] implies no intent to so restrict the meaning, and we will not read such intent into section 5845[(b)].

See also *United States* v. *Oakes*, 564 F.2d 384, 388 (10th Cir. 1977) (refusing to confine the term "trigger" in Section 5861(d) to a particular type of triggering mechanism), cert. denied, 435 U.S. 926 (1978).[2]

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[2] Moreover, a term not defined by statute should "normally [be] construe[d] * * * in accord with its ordinary or natural meaning." *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993), citing *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The ordinary meaning of the term "trigger" is not restricted to a small lever pulled by a finger, but is broad enough to include any mechanism

Petitioner's construction of the term "trigger" is also inconsistent with the congressional objective, in enacting the NFA, of depriving criminals of certain particularly dangerous types of weapons, including machineguns. See S. Rep. No. 1303, 86th Cong., 2d Sess. 2 (1960). As the court of appeals observed, "[petitioner's] definition would lead to the absurd result of enabling persons to avoid the NFA simply by using weapons that employ a button or switch mechanism for firing." Pet. App. 17 n.2.

Petitioner also maintains that the rule of lenity requires that, absent further definition in the NFA, the term "trigger" must be accorded its narrowest possible meaning. As this Court recently explained in *Smith* v. *United States*, 113 S. Ct. 2050 (1993), however, "[t]he mere possibility of articulating a narrower construction [of a term in a statute] does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute." *Id.* at 2059 (internal quotation marks omitted). In this case, "[i]mposing a more restrictive reading of the [term 'trigger'] does violence not only to the structure and language of the statute, but to its purpose as well." *Id.* at 2060; see *United States* v. *Jokel*, 969 F.2d at 135 (holding that application of the rule of lenity to narrow the definition of "trigger" would defeat the intent of Congress).[3]

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that is used to initiate the firing sequence. See *Jokel*, 969 F.2d at 134-135, citing *Webster's Third International Dictionary of the English Language* 2444 (1976).

[3] Petitioner is mistaken in arguing (Pet. 8, 9-10) that *United States* v. *Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992), supports application of the rule of lenity. In *Thompson/Center*, the Court addressed the question whether the term "making," as used in the NFA (26 U.S.C. 5821), includes a kit consisting of a pistol together with components that permit its conversion into a short-

2. Noting a conflict among the circuits on the question, petitioner also claims (Pet. 10-11) that he was entitled to an instruction that, in order to obtain a conviction under Section 5861(d), the government was required to establish that he knew that his machinegun possessed the characteristics that made it subject to registration under the NFA.

In *Staples* v. *United States*, cert. granted, 113 S. Ct. 2412 (1993) (No. 92-1441), the Court granted certiorari on the question whether, in order to convict a defendant of possessing an unregistered machinegun, in violation of 26 U.S.C. 5861(d), it is necessary to prove that he knew the firearm possessed all the physical characteristics of a machinegun. It is, however, unnecessary to hold this case pending the Court's decision in *Staples*. As petitioner concedes (Pet. 5; Pet. C.A. Br. 26), at trial he neither objected to the instruction given nor proposed an alternative.[4] See Pet. App. 17. He is therefore entitled to relief only if the alleged instructional defect constitutes

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barreled rifle that must be registered under the NFA. The Court found it necessary to apply the rule of lenity and construed the term not to embrace such kits because "[a]fter applying the ordinary rules of statutory construction [the Court was] left with an ambiguous statute." 112 S. Ct. at 2109. As explained above, the term "trigger" in 26 U.S.C. 5845(b) does not suffer from any similar ambiguity.

[4] Even in the court of appeals, petitioner did not argue that he was entitled to an instruction that in order to convict him the jury must find that he knew that he possessed a device with all of the physical characteristics of a machinegun. Instead, he argued only that he was entitled to essentially the same instruction that was used in *Staples*: that "the Government was required to prove that Appellant knew that these otherwise legal items could be combined together into a 'dangerous device of a type that would alert one to the likelihood of regulation.'" Pet. C.A. Br. 22; see also Pet. C.A. Br. 26.

plain error. See Fed. R. Crim. P. 30, 52(b); *Singer* v. *United States*, 380 U.S. 24, 38 (1965).

Under Fed. R. Crim. P. 52(b), a plain error may be noticed only if it "affect[s] substantial rights." As the Court explained in *United States* v. *Olano*, 113 S. Ct. 1770, 1778 (1993), that "means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." There was no such error here. The bolt assembly found in close proximity to the M-11 pistol in petitioner's bedroom bore a label ("M-11 SMG") showing that it was intended for use to convert an M-11 pistol to a fully automatic submachinegun. See Pet. App. 15 n.1. As there was therefore little doubt that petitioner knew that he possessed a "combination of parts" from which a machinegun within the meaning of 26 U.S.C. 5845(b) could be assembled, it is hardly surprising that he did not focus on the issue of knowledge at trial or ask for a detailed instruction on that issue. For the same reason, the failure of the trial court to give the instruction that petitioner now seeks did not affect the outcome of the trial. See *United States* v. *Sellers*, 926 F.2d 410, 417 (5th Cir. 1991) (no plain error when trial court failed to give instruction that government must prove defendant's knowledge that waste was hazardous because evidence left little doubt defendant knew of potential danger).

In any event, the instruction that was given is a legally adequate instruction concerning the knowledge element of the crime, regardless of how this Court decides *Staples*. The instruction required the jury to find that petitioner's "possession of the firearm must have been knowing" and that the jury could not convict petitioner unless it "conclude[d] beyond a reasonable doubt that [petitioner] knowingly possessed an unregistered firearm as charged." Pet. C.A. Br. 25-26. The instruction is adequate as a matter of law because it required

the jury to find knowing possession before convicting him. In the absence of an objection, the court's failure to elaborate on the meaning of "knowing" as applied to this case was not erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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